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Supreme Court of the United States

OCTOBER TERM, 1970

70-54

No. ~~1092~~

VICTORY CARRIERS, INC., S.S. SAGAMORE HILL, AND GULF STEVEDORE CORP.,

Petitioners,

versus

BILL LAW,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE PETITIONERS

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No. 1092

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Petitioners,

versus

BILL LAW,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

A. The opinion of the Court of Appeals entered on September 16, 1970 (A. 95) is officially reported at 432 F.2d 376.

B. The opinion of the District Court (A. 50) is not officially reported. It is unofficially reported at 1970 A.M.C. 397.

JURISDICTION

A. The judgment of the Court of Appeals was made and entered on September 16, 1970 (A. 95). On Sep-

tember 24, 1970, Petitioners filed timely motion for enlargement of time within which to petition for rehearing and on September 24, 1970, the Court of Appeals granted an enlargement of time to October 14, 1970, to file said petition for rehearing; on October 13, 1970, Petitioners filed in the Court of Appeals a petition for rehearing *en banc*, and alternatively, for rehearing. By order dated November 3, 1970 (A. 119), the Court of Appeals denied said petition.

B. On December 12, 1970, a petition for a writ of certiorari was filed in this Court, and on March 1, 1971, the writ was granted.

C. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The statute involved herein is 62 Stat. 496, 46 U.S.C. § 740, Extension of Admiralty Jurisdiction Act. This statute, as set forth in 46 U.S.C. § 740, reads as follows:

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.
>
> In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and

consummated on navigable water: Provided, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: Provided further, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage. June 19, 1948, c. 526, 62 Stat. 496."

QUESTION PRESENTED

The Respondent herein, Bill Law, was a fork lift machine operator who was working exclusively on the dock moving cargo from a point of dockside storage to a point on the dock from which it was subsequently loaded onto the vessel S.S. SAGAMORE HILL. He was injured while working on the dock when the overhead, or "headache", rack of the lift machine fell on him through no fault of the vessel.

The question presented for review is:

Does the warranty of seaworthiness owed by a vessel extend to the operator of a fork lift machine who is operating the machine exclusively upon the dock moving cargo from its position of dockside storage to

a point on the dock from which it is subsequently loaded onto the vessel and who is injured by reason of some fault in the lift machine and not by the vessel or its equipment?

STATEMENT OF THE CASE

On December 11, 1967, the Respondent, Bill Law, was employed by the Petitioner Gulf Stevedore Corp. (hereinafter referred to as "Gulf") as a fork lift machine operator to move aircraft landing mats from their position of storage on the dock to a position on the dock near the Petitioner vessel S.S. SAGAMORE HILL, a distance of some fifty (50) feet (A. 60-61, 90-91). The landing mats were not loaded directly onto the vessel from the fork lift machine being operated by the Respondent; he would set them down on the dock, and the mats would subsequently be loaded onto the vessel by other longshoremen by use of the vessel's gear and equipment (A. 90-91). The fork lift machine did not at any time go on board the vessel, but remained exclusively upon the dock (A. 92).

While the Respondent was transporting a bundle of mats from the dock storage area to the loading point, the overhead protection rack (commonly referred to as a "headache rack") of the lift machine came loose, fell and struck the Respondent (A. 69). None of the vessel's gear, equipment, or appurtenances were in any way involved with the loosening of the rack and the resulting accident (A. 90).

Bill Law subsequently filed a complaint in the United States District Court for the Southern District of Ala-

bama against the Petitioner, Victory Carriers, Inc. (hereinafter referred to as "Victory"), as owner of the S.S. SAGAMORE HILL, alleging that his injuries were caused by the unseaworthiness of the vessel and the negligence of Victory (A. 3-10). Victory answered Law's complaint (A. 13-17) and filed a third-party action against Gulf seeking indemnification from it (A. 18-23). Gulf filed its answer to the complaint of Law and to the third-party complaint of Victory (A. 33-41).

Gulf then took the discovery deposition of Respondent Bill Law (A. 55-94), and subsequently moved for summary judgment on the principal ground that the warranty of seaworthiness owed by a vessel did not extend to Respondent or to the fork lift machine which he was operating on the dock (A. 42-45). Victory moved for a summary judgment in its favor on the same grounds (A. 46), and Law filed a cross-motion for a summary judgment in his favor (A. 47-49). On July 15, 1969, the District Court entered its order granting the motions of Gulf and Victory for summary judgments and denying the cross-motion for summary judgment of Law (A. 50-54).

In its opinion the District Court held that Bill Law "was not engaged in work for the service of the ship and is not covered by the warranty of seaworthiness." (A. 52). The District Court further held that: "The Plaintiff was not engaged in the *actual* loading of the vessel at the time of the accident. It is easy to say that he was assisting or contributing in the loading of cargo aboard the vessel. But the same rationale can apply to innumerable persons who perform work

which is necessary or required to 'service' the ship for sea duty." (A. 52-53).

The Court of Appeals reversed the District Court by opinion dated September 16, 1970 (A. 95), and held that the fork lift machine being operated exclusively upon the dock to move cargo from a position of storage to a point on the dock from which it was subsequently loaded onto the vessel was in effect an appurtenance of the vessel to which the seaworthiness warranty extended. In support of its holding the Appellate Court cited its own decision of *Deffes vs. Federal Barge Lines, Inc.*, (5 Cir., 1966) 361 F.2d 422, cert. denied, 385 U.S. 969. The Court of Appeals further held that Law was engaged in loading the vessel and was entitled to the warranty of seaworthiness and relied on this Court's decisions of *Seas Shipping Co. vs. Sieracki*, 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099; and *Gutierrez vs. Waterman Steamship Corp.*, 1963, 374 U.S. 858, 83 S.Ct. 1863, 10 L.Ed.2d 1082.

SUMMARY OF ARGUMENT

I.

The Extension of Admiralty Jurisdiction Act, 62 Stat. 496, 46 U.S.C. §740 did not extend maritime jurisdiction to an injury which is caused on the pier by pier-based equipment. This was expressly stated by this Court in *Nacirema Operating Company vs. Johnson*, 1969, 396 U.S. 212, 223. See also dissenting opinion in *Gebhard vs. S.S. Hawaiian Legislator*, (9 Cir., 1970) 425 F.2d 1303, at 1313. In *Gutierrez vs. Waterman Steamship Corp.*, 1963, 374 U.S. 858, this Court held

that maritime jurisdiction did extend to an injury caused by a ship which was felt ashore at a time and place not remote from the wrongful act; however, that decision did not conclude that maritime jurisdiction extended to an injury which occurs on the dock and is caused solely by defective shore-based equipment operated exclusively upon the dock.

The Respondent in the instant case was injured when the overhead protection rack of the fork lift machine he was operating exclusively upon the dock for the purpose of transporting cargo from its position of dock-side storage to a point on the dock from which it was subsequently loaded onto the vessel. None of the vessel's gear, equipment, or appurtenances were in any way involved with the accident; the same was caused solely by some defect in the shore-based equipment. The lift machine did not become an appurtenance of the vessel by reason of the fact it was used to transport cargo, which was subsequently loaded onto the vessel, on the dock. Consequently, the Respondent's maritime claim of unseaworthiness against the vessel and her owner is outside the Extension of Admiralty Jurisdiction Act, and for this reason, the judgment of the Court below should be reversed.

II.

The warranty of seaworthiness which was created by dictum in *The Osceola*, 1903, 189 U.S. 158, extended to shore-based workers injured on board a vessel in *Seas Shipping Co. vs. Sieracki*, 1946, 328 U.S. 85, and taken ashore in *Gutierrez vs. Waterman Steamship Corp.*, 1963, 374 U.S. 858, for injuries on the pier which

were caused by the vessel, does not extend to a worker injured on the pier by shore-based equipment which is used on the pier solely for moving cargo to a point alongside the vessel for subsequent loading onto the vessel.

The fact that the shore-based equipment is used to move cargo from dockside storage to a point on the dock from which it is subsequently loaded onto the vessel does not have the effect of making the shore-based equipment an appurtenance of the vessel so as to visit liability upon it under the seaworthiness doctrine. *Forkin vs. Furness Withy & Co.*, (2 Cir., 1963) 323 F.2d 638; *McKnight vs. N. M. Patterson & Sons*, (N.D. Ohio, 1960) 181 F.Supp. 434, aff'd, 286 F.2d 250 (6 Cir., 1960), cert. denied, 368 U.S. 913. The lift machine was nothing more than a conveyance to bring cargo to the ship and did not form a part of the loading process. Any different interpretation of the function of the lift machine in the instant case would have the effect of extending the seaworthiness doctrine to factual situations even more completely unrelated to the vessel.

Under the decision here for review, the vessel assumes a passive, secondary role in a shore-based injury, and the vessel's presence is apparently immaterial as the test now becomes, according to the Court below, whether the injured worker and the shore-based equipment were in some manner engaged in handling cargo ultimately destined for loading on a vessel. This was neither the intent or the holdings in *Sieracki* and *Gutierrez*.

While the Respondent was assisting in the overall loading of the vessel by moving cargo on the dock, he was not engaged in the actual loading process in the sense that it was part of the ship's work. *Daniel vs. Skibs A/S Hilda Knudsen,* (3 Cir., 1966) 368 F.2d 178, affirming 253 F.Supp. 758 (E.D. Pa., 1966); *Partenweederei, MS Belgrano vs. Weigel,* (9 Cir., 1962) 299 F.2d 897. The Respondent was not subjected to the "risks and hazards" of the sea as he drove the lift machine on the dock; his "risks and hazards" were no greater than any ordinary warehouseman may be expected to encounter, and the humanitarian policies underlying *Sieracki* would not be served by extending to him the warranty of seaworthiness.

There must be a beginning to the loading process and an ending to the discharging operation. A determination of when loading begins and when unloading terminates is material to guide lower courts in the application of the seaworthiness doctrine. The more realistic and logical approach is that loading commences with the physical act of lifting the cargo onto the vessel and terminates when the cargo is landed on the dock (or vehicle into which it is discharged) and the ship's gear has released it to its position on the dock. *Drumgold vs. Plovba,* (D. C. Va., 1966) 260 F.Supp. 983. The vessel becomes involved with the loading process (and has control of said loading) only when its gear or equipment is in physical contact with the cargo.

The affirmance by this Court of the opinion below would have the effect of extending the ambit of the seaworthiness doctrine beyond the limits of *Gutierrez,* and would make the vessel liable to individuals and

equipment on the shore under circumstances completely beyond any control of the vessel. Such result was not envisioned by the humanitarian policies underlying the seaworthiness doctrine, and the opinion of the court below should be reversed.

ARGUMENT

I.

The admiralty and maritime jurisdiction of the United States does not extend to a claim of unseaworthiness against a vessel by a longshoreman or shore-based worker who is injured on the pier by pier-based equipment, and not by any fault of the vessel or its equipment, under the Extension of Admiralty Jurisdiction Act.

The facts presented in this case are not in serious dispute. On the date of his accident, the Respondent Bill Law was employed by the Petitioner Gulf as a fork lift machine operator. Law, through the use of the lift machine, was moving aircraft landing mats from their point of dock storage to a position on the dock from which they would be subsequently loaded aboard the vessel by other longshoremen and the vessel's gear. At no time did the Respondent or the lift machine which he was operating go aboard the vessel. When the Respondent was some fifty (50) feet from the vessel, on the dock, the overhead protection rack of the lift machine came loose, fell, and struck the Respondent on the head. None of the vessel's gear or equipment caused the rack to fall on the Respondent. In summary, he was injured on the dock by pier-based

equipment through no fault of the vessel's gear, appurtenances and equipment.

The Court of Appeals, building on its own decision of *Deffes vs. Federal Barge Lines, Inc.*, (5 Cir., 1966) 361 F.2d 422, and this Court's decisions of *Seas Shipping Co. vs. Sieracki*, 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, and *Gutierrez vs Waterman Steamship Corporation*, 1963, 374 U.S. 858, 83 S.Ct. 1863, 10 L.Ed.2d 1082, held that (1) the lift machine was in effect an appurtenance of the ship, (2) that the Respondent was involved in the loading process of the vessel, and (3) he was within the scope of the warranty of seaworthiness. The court below gave no consideration to the Extension of Admiralty Jurisdiction Act, 62 Stat. 496, 46 U.S.C. § 740, or to the clear language of this Court regarding the applicability of this Act in *Nacirema Operating Company vs. Johnson*, 1969, 396 U.S. 212, 90 S.Ct. 347, 24 L.Ed.2d 371. (The Act and the *Nacirema Operating Company vs. Johnson* decision were raised in the Court of Appeals on Petitioners' petition for rehearing filed therein.)

Admittedly, the *Nacirema* decision was concerned with the issue of whether a longshoreman injured on the pier was entitled to benefits under the Longshoremen's and Harbor Workers' Act, 44 Stat. 1424, 33 U.S.C. §§ 901-950. However, this Court did discuss portions of the Extension of Admiralty Jurisdiction Act therein and commented upon the same as follows:

> " 'The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or

property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.'

By its very choice of language, the Act re-enforces the conclusion that Congress was well aware of the distinction between land injuries and water injuries and that when it limited recovery to injuries on navigable waters, it did not mean injuries on land. The Act no doubt extended the admiralty tort jurisdiction to ship-caused injuries on a pier. But far from modifying the clear understanding in the law that a pier was an extension of land and that a pier injury was not on navigable waters but on land, the Act accepts that rule and nevertheless declares such injuries to be maritime torts if caused by a vessel on navigable waters.

'"The Extension Act was passed to remedy the completely different problem that arose from the fact that parties aggrieved by injuries done by ships to bridges, docks, and the like could not get into admiralty at all. There is no evidence that Congress thereby intended to amend or affect the coverage of the Longshoremen's Act or to overrule Swanson v. Marra Bros., supra, decided just two years earlier. While the Extension Act may have the effect of permitting respondents to maintain an otherwise unavailable libel in admiralty, see Gutierrez v. Waterman S.S. Corp., 373 US 206, 10 L.Ed.2d 297, 83 S. Ct. 1185 (1963), the Act

has no bearing whatsoever on their right to a compensation remedy under the Longshoremen's Act.

"There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. *But even construing the Extension Act to amend the Longshoremen's Act would not affect this result, since longshoremen injured on a pier by pier-based equipment would still remain outside the Act.*" 396 U.S. at 221-223. (Emphasis added.)

Circuit Judge Wright in his dissenting opinion in *Gebhard vs. S.S. Hawaiian Legislator,* (9 Cir., 1970) 425 F.2d 1303, at 1313 commented on the foregoing language from *Nacirema* as follows:

"Justice White's observation could not have been casual or unintended. For the court below, whose judgment the Supreme Court reversed, had as an alternate ground of decision relied on the Extension Act to expand coverage under the Longshoremen's Act. Marine Stevedoring Corp. v. Oosting, 398 F.2d 900, 906 (4th Cir. 1968). Judge Sobeloff suggested that the alternative to so construing the Longshoremen's Act was the toleration of a series of 'harsh and incongruous' differences in treatment of similarly-situated harbor workers. Id. at 907. The point of Justice White's remark, then, was that even were the Longshoremen's Act construed as incorporating the Extension

Act, the incongruities feared by the Fourth Circuit would not be lessened. Uniform treatment of longshoremen's injuries could not be achieved, since *even under the Extension Act injuries on a pier resulting from pier-based equipment are not cognizable in admiralty* — even though they occur in connection with the loading or unloading of a ship. Justice White's construction of the Extension Act was thus central to his rejection of the reasoning below.

"I should have thought the Supreme Court's construction of the Extension Act sufficient to dispose of plaintiff's unseaworthiness claim. For it is conceded that the injury here occurred 'on a pier.' And the only equipment alleged to be not reasonably fit for its intended use is 'pier-based' — namely, the straddle carriers."

In *Gutierrez vs. Waterman Steamship Corp.*, 1963, 374 U.S. 858, 83 S.Ct. 1863, 10 L.Ed.2d 1082, this Court extended the applicability of the doctrine of seaworthiness to longshoremen injured on the pier and held that "the duty to provide a seaworthy ship and gear, including cargo containers, applies to longshoremen unloading the ship whether they are standing aboard the ship or on the pier." 376 U.S. at 215. In *Gutierrez* the longshoreman was injured on the pier when he slipped on beans which had spilled from defective bags discharged from the vessel. This Court also considered the Extension of Admiralty Jurisdiction Act therein and concluded:

> "We think it sufficient for the needs of this occasion to hold that the case is within the maritime jurisdiction under 46 USC § 740 when, as here, it is alleged that the ship owner commits a tort while or before the ship is being unloaded, and the impact of which is felt ashore at a time and place not remote from the wrongful act." 373 U.S. at 210.

This holding is not inconsistent with the language in *Nacirema* supra, to the effect that a longshoreman injured on the pier by pier-based equipment is outside the Extension Act. The factual situations are clearly different and distinguishable. If the vessel commits a tort, the impact of which is felt ashore, the Extension Act, under the holding of *Gutierrez*, is applicable; if the injury is caused on the pier by pier-based equipment, the Act, under *Nacirema*, is not applicable. The Extension Act by its own language extends the admiralty and maritime jurisdiction of the United States only to cases where the injury on land is caused by a vessel on navigable waters, and not to injuries on land caused by pier-based equipment.

Here, the Respondent's injury was admittedly not caused by any of the vessel's gear but was caused by some defect in the shore-based lift machine he was operating some fifty (50) feet away from the vessel. The Court of Appeals apparently disposed of any problem as to the involvement of the vessel's gear and appurtenances in the subject accident by simply concluding the lift machine, although operated exclusively on the pier, was an appurtenance of the vessel. In ar-

riving at this conclusion, the court below relied upon its own decision of *Deffes vs. Federal Barge Lines, Inc.*, (5 Cir., 1966) 361 F.2d 422, cert. denied 385 U.S. 969, wherein the court held that a defective shore-based marine leg used to unload grain from a barge made the barge unseaworthy.[1] In *Deffes* the injured longshoreman was working on board the barge and the marine leg extended into the vessel from the shore. Clearly, the case is distinguishable from the instant case where the lift machine moved exclusively on the pier and never came into contact with the vessel or its gear. The lift machine in the instant case was not, and did not become, an appurtenance of the SS SAGAMORE HILL; it was a mere means of shore-side conveyance used to move cargo from one point on the dock to another point on the dock. The lift machine was pier-based equipment and the Respondent was a pier-based worker; his injury occurred on the pier as a result of some alleged defect in the pier-based equipment. Consequently, the Respondent's maritime claim of unseaworthiness against the vessel is outside the Extension of Admiralty Jurisdiction Act, and for this

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[1]The various Circuit Courts are in sharp conflict on the issue of whether shore-based equipment used in the loading or discharging of a vessel comes within the scope of the warranty of seaworthiness. The extension of the warranty of shore-based equipment has been denied in the cases of *Forkin vs. Furness Withy & Co.*, (2 Cir., 1963) 323 F.2d 638; *McKnight vs. N. M. Patterson & Sons*, (6 Cir., 1960) 286 F.2d 250, cert. denied 368 U.S. 913; *Sherbin vs. S. G. Embiricos*, (E.D. La., 1962) 200 F. Supp. 874; *Henry vs. S.S. Mount Evan*, (D. Ct. Md., 1964) 227 F.Supp. 408. The extension has been approved in *Deffes vs. Federal Barge Lines, Inc.*, supra, *Spann vs. Lauritzen*, (3 Cir., 1965) 344 F.2d 204; *Huff vs. Matson Navigation Company*, (9 Cir., 1964) 338 F.2d 205.

reason, the judgment of the Court of Appeals should be reversed.

II.

The warranty of seaworthiness owed by a vessel does not extend to a shore-based worker who is injured on the dock by shore-based equipment, and not by the vessel and its equipment, while moving cargo from a position of dockside storage to a point on the dock from which it is subsequently loaded onto the vessel.

A. General Discussion.

Prior decisions of this Court have left little doubt that a shore-based worker who is injured on a vessel while in the service of the vessel is entitled to the warranty of seaworthiness which was created in the decision of *The Osceola*, 1903, 189 U.S. 158, 23 S. Ct. 483, 47 L. Ed. 460. In the landmark case of *Seas Shipping Co. vs. Sieracki*, 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, this Court held that the obligations of seaworthiness, traditionally owed by an owner of a ship to seamen, extended to longshoremen injured aboard a ship while doing ship's work. In *Pope & Talbot vs. Hawn*, 1953, 346 U.S. 406, 74 S. Ct. 202, the warranty was extended to all shore-based workers engaged in the ship's service on board the vessel; and in *Alaska S.S. Co. vs. Petterson*, 1954, 347 U.S. 396, 74 S.Ct. 601, 98 L.Ed. 798, the doctrine was held to include stevedore furnished equipment for use in the ship's service as well as the vessel's own equipment. See also *Italia Societa per Azioni di Navagazione vs. Oregon Stevedoring Co.*,

1964, 376 U.S. 315, 84 S.Ct. 748, 11 L.Ed.2d 732. Following a line of lower court decision,[2] this Court held in *Gutierrez vs. Waterman Steamship Corp.*, supra, that "the duty to provide a seaworthy ship and gear, including cargo containers, applies to longshoremen unloading the ship whether they are standing aboard ship or on the pier." 373 U.S. at 215.

In *Gutierrez*, and the lower court decisions relied on therein, the vessel was directly involved in the injury to the longshoreman on the pier. In *Gutierrez* the injury occurred on the pier as the result of defective cargo containers unloaded from the vessel; in *Strika vs. Netherlands Ministry of Traffic*, supra, use of an improper wire cable caused a hatch cover to fall on a longshoreman on the dock; in *Robillard vs. A. L. Burbank & Co.*, supra, a longshoreman on the dock was struck by cargo which was knocked from the deck of the vessel to the pier; and in *Hagans vs. Farrell Lines, Inc.*, supra, a longshoreman on the pier was struck by sacks of beans when a defective winch did not properly brake. *Gutierrez* left unanswered the question of whether the ship's duty to provide a seaworthy ship extends to those individuals who are injured while working exclusively upon the pier moving cargo for subsequent loading onto the vessel and utilizing equipment completely disconnected from the

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[2] ***Strika vs. Netherlands Ministry of Traffic***, (2 Cir., 1950) 185 F.2d 555; ***Robillard vs. A. L. Burbank & Co.***, (S.D.N.Y., 1960) 186 F.Supp. 193; ***Hagans vs. Farrell Lines, Inc.***, (3 Cir. 1956) 237 F.2d 477.

vessel. The rationale of *Gutierrez* is understandable in that the vessel was *directly* involved with the longshoreman's injury, i.e., cargo containers taken from the vessel immediately prior to the accident were defective. Here, the injury was caused by an allegedly defective shore-based fork lift machine[3] while the operator was moving cargo on the dock for subsequent loading onto the vessel. Contrary to *Gutierrez*, the lift machine had never been aboard the vessel; the machine did not go aboard the vessel; and the vessel's gear, equipment, appurtenances, and cargo were not in any manner responsible for the accident.

The Court below, after observing that *Seas Shipping Co. vs. Sieracki*, supra, and *Gutierrez vs. Waterman Steamship Corp.*, supra, were "the major constellations by which we steer our course in the present case", (A. 101), felt that disposition of two further legal obstacles were necessary for determination before reaching its conclusion that the Respondent came within the ambit of the vessel's duty of seaworthiness. First, the court below realized the necessity of holding the shore-based lift machine to be an appurtenance of the vessel, and second, it was necessary, in view of the principles enunciated in *Sieracki*, to find he was in the service of the ship. In its determination of these two issues, it is submitted the court below erred to reversal.

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[3]The District Court did not reach any decision on the question of any defect in the lift machine and stated a determination of this question was immaterial to the issue presented.

B. Shore Based Equipment.

As previously noted herein under the first point of argument, the Court of Appeals relied upon its own decision of *Deffes vs. Federal Barge Lines, Inc.*, (5 Cir., 1966) 361 F.2d 422, cert. denied, 385 U.S. 969, in holding the fork lift machine here involved was an appurtenance of the vessel. This conclusion was reached even though the lift machine was operated exclusively upon the dock and cargo was not loaded directly from the fork lift to the vessel. In *Deffes* the "shore-based" equipment used in the unloading process was a marine leg which extended from the dock into the barge; the longshoreman was on the barge when injured. The court below chose to align itself with the decisions of the Third and Ninth Circuits, *Spann vs. Lauritzen*, (3 Cir., 1965) 344 F.2d 204, and *Huff vs. Matson Navigation Company*, (9 Cir., 1966) 361 F.2d 422, and held in *Deffes* that "a defective marine leg used in unloading grain makes a barge unseaworthy." 361 F.2d at 427.

In a recent opinion of the court below *Chagois vs. Lykes Bros. Steamship Company, Inc.*, (5 Cir., 1970) 432 F.2d 388, it was held that a longshoreman, who was injured while working in a boxcar on the dock from which rice was being loaded by means of a permanently shore-based marine leg onto the vessel, was entitled to the warranty of seaworthiness. The longshoreman was injured when a rotating auger (a device used in the boxcar to channel rice toward the boxcar door) which he was operating struck the boxcar floor and threw him off balance. The court, relying on its opinion in the instant case, and other cases, held

that the longshoreman's work when he was injured was an essential part of an unbroken sequence of moving the rice from the pier to the ship. Thus, the court below has again extended the seaworthiness doctrine further inland and held that a device used on the shore which was apparently separate from the marine leg which extended into the vessel was an appurtenance of the vessel although it does not appear the device was itself defective.[4]

Deffes, Chagois, and the instant case are all diametrical departures from the Fifth Circuit's decision of *Kent vs. Shell Oil Company,* (5 Cir., 1961) 286 F.2d 746. In *Kent* a truck driver who was injured while delivering a cargo of pipe to a barge was denied the seaworthiness warranty by the court below. The court said:

> "Where the injuries are sustained wholly ashore and are caused by a thing not a part of a vessel or its appurtenances, the failure or deficiency of such facility is not deemed either to constitute unseaworthiness or give rise to any recovery under the doctrine of unseaworthiness. Fredericks vs. American Export Lines, 2 Cir., 1955, 227 F.2d 450, 454, 1956 A.M.C. 57." 286 F.2d at 752.

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[4]In a more recent opinion from the Court of Appeals, *Johnson vs. Oil Transport Company, Inc.,* (5 Cir., 1971) ____ F.2d ____ (decided March 12, 1971), the instant case was cited in the dissenting opinion of Chief Judge Brown for the proposition that a ship owner is accountable for the seaworthiness of devices located and used on land.

It is interesting to note that the Fifth Circuit has never expressly overruled *Kent vs. Shell Oil Company*, supra. It is submitted that the foregoing quote from *Kent* is a correct statement of the law applicable to the instant case and is in accord with the language of this Court in *Nacirema Operating Company vs. Johnson*, supra, wherein it was stated that:

> "But even construing the Extension Act to amend the Longshoremen's Act would not affect this result, since longshoremen injured on a pier by pier-based equipment would still remain outside the Act." 24 L.Ed.2d at 379-380.

Gutierrez, in taking the seaworthiness doctrine ashore, did not alter the basic maritime principle that injuries sustained wholly ashore and which are caused by a thing not a part of the vessel or its appurtenances do not fall within the ambit of the seaworthiness doctrine.

Two other Circuits, the Second and Sixth, have held that the warranty of seaworthiness does not extend to shore-based equipment. *Forkin vs. Furness Withy & Co.*, (2 Cir., 1963) 323 F.2d 638, and *McKnight vs. N. M. Patterson & Sons*, (N.D. Ohio, 1960) 181 F.Supp. 434, aff'd 286 F.2d 250 (6 Cir., 1960), cert. denied, 368 U.S. 913. This issue has not been decided by this Court, and there remains a direct conflict in the Circuit Courts on the question of whether the warranty of unseaworthiness extends to shore-based equipment. A determination by this Court that the warranty does not so extend would unquestionably have the result of reversing the Court of Appeals in the instant case because if the

warranty does not extend to shore-based equipment, it clearly would not extend to the exclusively shore-based lift machine here involved.

It is submitted that even in view of the decisions of *Deffes*, *Spann*, and *Huff*, the lift machine here involved was not, and did not become, an appurtenance of the vessel. The lift machine was used exclusively upon the dock to move cargo from dockside storage to a point on the dock from which it was subsequently loaded onto the vessel by other longshoremen by use of the ship's gear. The process was analogous to the old horse drawn wagon which in days gone by would move alongside the vessel on the dock for purposes of making its cargo available to the ship's gear. The wagon was supplanted by the truck, and now the fork lift truck tends to supplant the truck. This equipment (when used on the dock), contrary to the conveyor belts and similar mechanisms running into the vessel from ashore, is used to bring cargo to and from the ship and does not form a part of the loading or discharging process.

Under the holding of the Court of Appeals, any means of conveyance of cargo destined for shipment aboard a vessel would fall within the ambit of the seaworthiness doctrine; hence, the truck which moves far inland carrying cargo destined for vessel shipment, the train which moves inland toward the port with cargo labeled for vessel shipment, and their respective operators would apparently all fall within the ambit of the doctrine. Obviously, this was not, and is not, the

intent of *Sieracki* and its long line of descendant decisions.

Again, the now classic question is posed: To what limits does the seaworthiness doctrine extend?

Here, we have a vessel whose equipment, property, and crew were for all intents and purposes, reasonably fit for its intended use; the defective appurtenance complained of by the Respondent was a shore-based lift machine over which the vessel had absolutely no control. This was not defective equipment brought aboard the vessel by the stevedore, cf. *Alaska S.S. Co. vs. Petterson,* (1954) 347 U.S. 396, 74 S.Ct. 601, 98 L.Ed. 798, but was equipment used solely on the dock for moving cargo. In this Court's recent decision of *Usner vs. Luckenbach Overseas Corporation,* (1971) ____ U.S. ____, 39 L.W. 4146, it was held that "it would be equally erroneous here, where no condition of unseaworthiness existed, to hold the ship owner liable for a third party's single and wholly unforeseeable act of negligence." It is submitted that similar reason and logic compels the conclusion that a ship owner and its vessel should not be held liable for an accident which occurs on the dock as a result of defective shore-based equipment whidh is being used solely for the purpose of transporting cargo on the dock and over which the vessel has no control.

In *Gutierrez,* this Court noted that various far-fetched hypotheticals were raised such as a suit in admiralty for an ordinary automobile accident involving a ship's officer on ship business in port or for

someone's slipping on beans that continued to leak from defective bags in Denver. These hypotheticals have been brought one step closer to reality by the Court of Appeals' decision in the instant case. The District Court in the instant case was likewise concerned with hypotheticals and posed the questions: "Would a truck driver who drives to the dock in his truck and unloads freight which in turn will become cargo for a vessel be entitled to a seaworthy vessel? Would his truck be an appurtenance to the ship? The Court thinks not." (A. 52). The Court of Appeals left unanswered the question of whether a longshoreman who is instructed to drive a truck many miles inland on a mission for his employer would be entitled to the warranty of seaworthiness and stated: "If such a case is to arise in the future, it should be decided then, not now." (A. 115). As a practical matter, the court below has invited further litigation. Numerous claims may now be expected to be forthcoming as the *Sieracki* doctrine is once more pushed further inland. Under the rationale of the Court of Appeals' decision, a vessel still at sea will owe her warranty of seaworthiness to those workers on the shore who move cargo to dockside in anticipation of her arrival, or conversely, to those workers who move cargo into the warehouses and storage areas by lift machines, or other means of conveyance, following her departure. Conceivably, under the opinion of the court below, if a vessel still several miles at sea radios her expected arrival hour, and on shore the workers move her cargo to the pier in anticipation of loading, the vessel, although still at sea, may breach her warranty of seaworthiness to those who may be injured in moving her cargo in preparation for loading.

Clearly, under the case here for review, the vessel now takes a secondary, passive role in the shore-based injury; the vessel's presence is apparently immaterial as the test now becomes, according to the Appellate Court, whether the injured worker and the shore-based equipment were in some manner engaged in handling cargo ultimately destined for loading onto a vessel. It is submitted this was neither the intent nor the holding of this Court in *Gutierrez*. The shore-based lift machine being operated by the Respondent at the time of his injury was not, and did not, become an appurtenance of the SS SAGAMORE HILL, and the Court of Appeals' holding in this respect should be reversed.

C. Service of the Ship.

The Court of Appeals, in its second step necessary to hold the Respondent entitled to the warranty of seaworthiness herein, erroneously concluded that he was engaged in loading the vessel. The District Court had held:

> "It is easy to say that he was assisting or contributing in the loading of the cargo aboard the vessel. But the same rationale can apply to innumerable persons who perform work which is necessary or required to 'service' the ship for sea duty. The liability of the ship is not unlimited. A line must be drawn." (A. 53).

In *Daniel vs. Skibs A/S Hilda Knudsen*, (3 Cir., 1966) 368 F.2d 178, affirming 253 F.Supp. 758 (E.D. Pa., 1966)

the court declined to extend the seaworthiness doctrine to a longshoreman who was injured in a warehouse when a pulley rope used to take cargo from a railroad flatcar broke causing a block to strike and injure him. The district court in Daniel said:

> "While Plaintiff's work may have contributed to the unloading process in a philosophical sense, it was not unloading in the sense that it was part of the ship's work. We are aware that the recent trend of decisions in this Circuit and the Supreme Court has been to widen the ambit of seaworthiness coverage. However, there has to be an end somewhere of the unloading process in the sense of liability imposing ship's work. 'Clearly the maritime jurisdiction extended to the act of reaching into the vessel and removing cargo. Such removal, having a beginning, had to have an end.' Spann vs. Lauritzen, 344 F.2d 204, 206 (C.A. 3, 1965)." 253 F.Supp. 758, at 762.

Further in the opinion the District Court said (253 F.Supp. at 762):

> "As pointed out above, the basis for the development of the warranty was to protect against maritime hazards those persons exposed to such hazards who are unable to protect themselves from the perils involved. The plaintiff here was completely shore-based. His work was ashore and he had no contact, remote or otherwise, with the ship. There is no more need for the development of a protective

shield for those in plaintiff's then occupation than there is for those engaged in any other industrial occupation. Plaintiff was subject to no particular maritime hazard, nor indeed, to any hazard that the ordinary warehouse workers would not encounter."

In *Partenweederei, MS Belgrano vs. Weigel,* (9 Cir., 1962) 299 F.2d 897, a plaintiff was struck by a ship's crane while operating a tractor that was pulling a loaded railroad car to the edge of the dock to get it within reach of the ship's loading gear. The Ninth Circuit Court of Appeals held the Plaintiff was not "loading" the vessel and said:

"The evidence of this case relating to the nature of libellant's work is not in dispute. The libellant was driving a tractor on the dock. His job was to push or pull railroad cars loaded with lumber up to a point on the spur track where the lumber could be reached by the ship's loading gear. He did not participate in loading the lumber onto the vessel or in stowing it. He had nothing to do with ship's tackle nor did his work require him to perform any service aboard the ship. His work was performing solely on the dock and in an operation preliminary to, but separate from, the work of loading the lumber onto the vessel." 299 F.2d 897, at 902.

The court below held that Respondent "was subjected to the risks and hazards of loading the ship"

(A. 115), and that he was "intimately involved in the process of loading a vessel" (A. 116). It is submitted that Respondent was neither subjected to the risks and hazards of loading a ship nor was he intimately involved in the loading process. The humanitarian policy which underlies the doctrine of seaworthiness was extended to longshoremen in *Sieracki* because over the years it had evolved that longshoremen were performing loading and discharging functions traditionally performed by seamen. Inasmuch as the seaman had been afforded the remedy of an action for seaworthiness, it was logical to extend the same remedy to the shore-based worker who assumed his duties on the vessel. However, it must be remembered that the doctrine was fostered to afford protection to the seaman who was subjected to the risks and perils of the sea who were unable to protect themselves from such perils and risks. The Respondent here was not subjected to any risks or perils of the sea; he was subjected to no greater risk than any other industrial worker nor to any greater hazard than any ordinary warehouseman may be expected to encounter. His job was to move cargo from a point of storage to a point on the dock from which it was subsequently loaded onto the vessel; his "risks and hazards" were no greater than those of a lift operator in any warehouse in any part of the country who moves cargo from a point of storage out onto the loading dock from which it is subsequently loaded onto a truck or boxcar. Certainly, the lift operator in the latter illustration is protected by no shield comparable to the doctrine of seaworthiness.

Admittedly, the Respondent was a member of a longshore gang some of whose members were working on board the vessel and other members were working on the pier. The Court of Appeals was hesitant to withhold the seaworthiness doctrine from the Respondent, who was working on the pier, when his brethren on the vessel would be entitled to said doctrine. This Court in *Nacirema Operating Company vs. Johnson*, supra, was confronted with the identical question of whether the longshoreman injured on the pier should receive the benefits of the Longshoremen's and Harbor Workers' Act, 44 Stat. 1424, 33 USC §§ 901-950, when his fellow worker on the vessel was entitled to the benefits of said Act, and, even in view of the apparent "harsh and incongruous" treatment of similarly-situated longshoremen, denied the benefits of the Act to the pier-based worker. Here, the title of the Respondent as a longshoreman or his status as a member of a longshore gang should play no role in a determination of whether he is within the ambit of the seaworthiness doctrine.

In the case of *Drumgold vs. Plovba* and *Hyter vs. Deniz Naklihati T.A.S.*, (E.D. Va., 1966) 260 F.Supp. 983 (two cases) quoted at length in the Appellate Court opinion (A. 103-109), the court declined to extend the warranty of seaworthiness to a longshoreman (Hyter) on the dock who was struck by a fork lift machine which was moving cargo from the dock to a storage area and to a longshoreman (Drumgold) who was injured when a truck, which was using its boom to move shifting boards near the vessel for subsequent loading onto the vessel, collapsed into the water. The court held the unloading process had ter-

minated in *Hyter's* case and that the loading process had not commenced in *Drumgold.* The plaintiff Hyter had argued that *Spann vs. Lauritzen,* supra, *Deffes vs. Federal Barge Lines, Inc.,* supra, and *Huff vs. Matson Navigation Company,* supra, extended the seaworthiness doctrine to the lift machine. Relying on *Fredericks vs. American Export Lines,* (2 Cir., 1955) 227 F.2d 450, the court declined to extend the doctrine. In its opinion, 260 F.Supp. at 986, the court said:

> "The plaintiffs in these cases are urging a further expansion of the *Huff, Spann,* and *Deffes* doctrine. They urge, and not without merit, that if the longshoreman is in any manner engaged in the service of the ship, the warranty of seaworthiness applies if such service is anywise connected with the contemplated loading or the contemplated removal from the pier apron of cargo already on the pier for the purpose of stowage in a warehouse or for any other transfer purpose."

> "Assuming without deciding the correctness of the rulings in *Huff, Spann,* and *Deffes,* this Court is not of the opinion that the seaworthiness doctrine can be so extended. For example, the longshoreman may be technically in the service of the ship if he is instructed to take a truck for the purpose of going into the city to secure a rope or wire necessary in connection with the loading or unloading operations of a particular vessel. While so engaged the brakes on the truck become defective and, at a point many miles from the

> vessel, the longshoreman is injured by reason of an accident. Plaintiffs argue that the truck's defective brakes would render the vessel unseaworthy. In effect, what plaintiffs wish to do is to extend to the injured longshoreman all of the benefits accruing to the injured seaman under the Jones Act."

In discussing the application of *Gutierrez* to the facts of the *Drumgold* and *Hyter* cases, the court said:

> "In *Gutierrez* the injury to the longshoreman was sustained when he slipped on loose beans spilled on the dock occasioned by an unseaworthy condition of the cargo while aboard the vessel, with a resultant spillage during unloading operations. We agree that *Gutierrez* clearly extends the seaworthiness doctrine to longshoremen 'loading or unloading' a ship, whether aboard the ship or on the pier. We do not, however find that the loading operation in *Drumgold* had commenced — and we further find that the unloading operation in *Hyter* had terminated — when the respective longshoremen were injured. Manifestly the items of equipment giving rise to the injuries were never intended to be used aboard ship; they were, at best, mere conveyors to bring equipment needed to the ship's side (*Drumgold*), or to remove already unloaded cargo to another area (*Hyter*). We find no authority which would cause us to hold that every piece of equipment and every activity leading up to or following the loading or unloading operation

must be covered under the warranty of seaworthiness. We are concerned with the ship and the ship's equipment attendant to the *ship's duty to load and unload.* If such assumption is incorrect we will be constantly confronted with claims alleging unseaworthiness of a vessel because of cargo, about to be loaded aboard ship, which falls in a warehouse on the pier thereby injuring an employee of the stevedoring concern. In *Drumgold* we do not believe that the loading operation, insofar as the warranty of seaworthiness is concerned, commenced until the shifting boards were in the process of being physically moved from the stevedore's truck to the deck. In *Hyter* we feel that the unloading terminated, insofar as the warranty of seaworthiness is concerned, when the bale of cork in a seaworthy condition was properly detached by the slingers and was at rest on the pier awaiting removal to another area. It was at these points that the warranty of seaworthiness started and stopped. Such a holding does no violence to *Gutierrez, Huff, Spann, Deffes,* and *Metzger,* all relied upon by the plaintiffs. It merely places a reasonable limitation upon the extent of the seaworthiness warranty."

The court below held that *Drumgold vs. Plovba,* supra, represented a "minority view" which defined loading "in an exceedingly narrow and mechanical fashion, limiting it to those activities which begin with the physical act of lifting the cargo onto the

vessel." (A. 103). The Court of Appeals chose to define "loading" and "unloading" as what it referred to "in a realistic sense rather than as hypertechnical terms of art." (A. 114). In so holding, the court relied upon *Byrd vs. American Export Isbrandtsen Lines, Inc.*, (E.D. Pa., 1969) 300 F.Supp. 1207, among other cases[5] wherein the Pennsylvania district court held that a longshoreman injured on the dock while moving a lift machine (by use of another lift machine) for subsequent loading onto a vessel was engaged in a "loading operation". The court in the *Byrd* decision had quoted with approval its own case of *Litwinowicz vs. Weyerhaeusen Steamship Co.*, (E.D. Pa., 1959) 179 F.Supp. 812, 817-818, as follows:

> "The term loading is not a word of art, and is not to be narrowly and hypertechnically interpreted. Plaintiffs' actions at the time of the accident were direct, necessary steps in the physical transfer of the steel from the railroad car into the vessel which constituted the work of loading."

Consequently, two divergent views have developed in the lower courts; *Drumgold* clearly establishes that there must be a beginning and an ending to the load-

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[5]*Gebhard vs. S.S. Hawaiian Legislator*, (9 Cir., 1970) 425 F.2d 1303; *Thompson vs. Calmar Steamship Corp.*, (3 Cir., 1964) 331 F.2d 657, cert. denied, 379 U.S. 913; *Hagans vs. Ellerman & Bucknall Steamship Co.*, (3 Cir., 1963) 318 F.2d 563; *Olvera vs. Michalos*, (S.D. Tex., 1968) 307 F.Supp. 9. To these cases may now be added *Chagois vs. Lykes Bros. Steamship Company, Inc.* (5 Cir., 1970) 432 F.2d 388.

ing and unloading operations,[6] while *Byrd*, followed by the court below, and other decisions,[7] would extend the doctrine of seaworthiness ashore to a land-based worker moving cargo on the dock. It is submitted the more rational and logical view is that illustrated by *Drumgold*. *Sieracki* was concerned with the protection of those who were performing tasks traditionally performed by seamen in extending to them the doctrine of a seaworthy vessel and its appurtenances; *Gutierrez* simply extended the ambit of the seaworthiness doctrine to injuries occurring on the pier when caused by the vessel. The Respondent in this case was neither doing a seaman's work nor incurring a seaman's hazards; he was on the pier when hit by the overhead protection rack of the shore-based lift machine he was operating. The vessel, except for the fact she lay alongside the dock, had absolutely no connection with the Respondent's accident.

An adoption of the view expressed by the *Byrd* decision and the court below would have the effect of further expanding the seaworthiness doctrine ashore and would subject a vessel to liability under the guise of unseaworthiness for accidents completely unrelated to the vessel and which in no manner involve any of her gear and equipment. It would as a matter of course follow that liability would be visited upon the injured

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[6]cf. *Young vs. Chevron Oil Company*, (E.D. La., 1970) 314 F.Supp. 1248; *DiPaola vs. International Terminal Operating Co.*, (E.D. N.Y., 1968) 294 F.Supp. 736; *Cannida vs. Central Gulf Steamship Corporation*, (E.D. Pa., 1970) 317 F.Supp. 873; *Daniel vs. Skibs A/S Hilda Knudsen*, supra; *Partenweederei MS Belgrano vs. Weigel*, supra.

[7]See cases cited in footnote 5.

employee's stevedore employer under *Ryan Stevedoring Co. vs. Pan-Atlantic Steamship Corp.*, 1956, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133, for the shore-based injury caused by shore-based equipment. Unquestionably, additional litigation would be forthcoming as the once ship-bound seaworthiness doctrine encompasses workers heretofore excluded and for whom the doctrine was never intended.

Petitioners do not endeavor here to seek a reversal of *Gutierrez vs. Waterman Steamship Corp.*, supra, nor do they seek an avoidance of vessel liability where the vessel itself, or its own appurtenances, has caused an injury on the pier. Petitioners do seek a limitation of the principles enunciated in *Gutierrez* to those instances where the vessel itself, as opposed to shore-based equipment over which the vessel has no control, causes the injury. The holding of the Court of Appeals that a longshoreman injured on the pier by pier-based equipment should be reversed.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed and the cause remanded with direction to affirm the judgment of the district court.

Respectfully submitted,

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PROOF OF SERVICE

I, W. BOYD REEVES, one of the attorneys for the Petitioners herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of April, 1971, I served three copies of the foregoing Brief of Petitioners on Bill Law, Respondent herein, by mailing the same in a duly addressed envelope, with first class postage prepaid, to Honorable Ross Diamond, Jr., 610 Van Antwerp Building, Mobile, Alabama, 36602, and to Honorable Joseph B. Stahl, 804 Baronne Building, 305 Ba-

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